In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1501

J. H. RUTTER REX MANUFACTURING COMPANY, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. In June 1957, the court of appeals sustained the Board's finding that the Company had violated its statutory duty to bargain with the Union and that this action had prolonged the employees' valid strike and transformed it into an unfair labor practice strike. The court entered a decree which directed the Company to reinstate the unfair labor practice strikers upon application, and to make them whole for any loss of earnings resulting from its failure to tender such reinstatement. 245 F. 2d 594.

In November 1961, the Board issued a specification setting forth the backpay claims for 207 employees.

The Board entered a supplemental order in June of 1966, which determined backpay due to 172 strikers and denied backpay to 36 others. 158 NLRB 1414. The court of appeals held that backpay ceased to accrue as of July 30, 1959, because of the Board's delay in issuing the specification. 399 F. 2d 356. This Court reversed, holding that "the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." 396 U.S. 258, 265 (Pet. App. 80A).

In the present second backpay proceeding, following this Court's decision, the Board ordered the Company to pay $53,078, plus interest, to 33 unfair labor practice strikers whom it had still not reinstated at the time of the initial backpay specification. The Board refused to deny the additional backpay claims because of the General Counsel's delay in issuing the second backpay specification.[1] The Board rejected the Company's contention that it should have been given access to the General Counsel's investigatory files, noting that the Company received all statements that could be construed as coming within the scope of the Board's "*Jencks* rule,"[2] that the backpay specification provided the names of the claimants' interim employers and earnings, that social security records and other earnings documentation were also produced, and that the claimants themselves were made available for cross-examination. The Board also rejected the Company's contention that the individual claimants had not made reasonable efforts to mitigate their loss of earnings. (Pet. App. 50A-73A.)

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[1] It was issued on November 30, 1970 (Pet. App. 4A).

[2] Section 102.118(b), (d) of the Board's Rules and Regulations, 29 C.F.R. 102.118(b), (d). See n. 3 *infra*, p. 4.

The court of appeals sustained the Board's decision and enforced its order except with respect to the claim of one employee. The court concluded that the Company was entitled to a new hearing on the claim of this employee, since the Board had erred in refusing to permit its former compliance officer to refer to notes in the Board's files for the purpose of refreshing his recollection as to an offer of reinstatement which the Company allegedly made to that employee. (Pet. App. 1A-45A.)

2. The Company contends (Pet. 7-8) that the Board and the court of appeals did not adequately consider the effect of the Board's delay in the instant case because of their belief that this Court's prior decision foreclosed the issue. As the court of appeals noted, however, the Trial Examiner ordered the General Counsel to explain the delay in issuing the second specification and "[o]nly after the examiner considered and accepted the explanation was the delay factor rejected" (Pet. App. 6A). Moreover, the court of appeals fully explained its reasons for concluding that the Board had acted "wisely" in waiting until after the first backpay case was finished before issuing the second specification.

The court noted that, if this Court had accepted the earlier decision limiting the Company's backpay liability, the second backpay specification "would have been of dubious legality" (Pet. App. 7A). It noted further that, since the Company did not offer reinstatement to some of the claimants until May 1970, if the Board had held a second hearing prior to their reinstatement, it would have been necessary to hold a third hearing after their backpay periods had been tolled by reinstatement offers (Pet. App. 7A-8A). In these circumstances, the court of appeals correctly concluded that "it would be both unjust and inconsistent with the Supreme Court's

decision in *Rutter Rex I* to require that the otherwise entitled claimants pay the price for the delay, which was in no way caused by them" (Pet. App. 8A).

3. The Company argues (Pet. 7-13) that the court of appeals created a new evidentiary privilege for the Board's investigatory files. The files contained informal, handwritten notes made by Board agents during and after interviews with the claimants.[3] The court of appeals properly held that such materials were privileged from discovery under "the established evidentiary privilege that accords qualified protection to the informal deliberations of all prosecutorial agencies and branches of government" (Pet. App. 19A). See, *e.g., Hickman* v. *Taylor*, 329 U.S. 495, 507-514; *United States* v. *Morgan*, 313 U.S. 409, 422; *National Labor Relations Board* v. *Clement Brothers Company*, 407 F. 2d 1027, 1030-1031 (C.A. 5); *Davis* v. *Braswell Motor Freight Lines*, 363 F. 2d 600, 603-605 (C.A. 5); *Intertype Company* v. *National Labor Relations Board*, 401 F. 2d 41, 44-45 (C.A. 4), certiorari denied, 393 U.S. 1049; *Kayser-Roth Hosiery Co.* v. *National Labor Relations Board*, 447 F. 2d 396, 399 (C.A. 6). Moreover, to impeach a witness with such materials, which contain " 'someone's version of what somebody else said' " (*Securities & Exchange Commission* v. *R. A. Holman & Co.*, 34 F.R.D. 139, 140 (S.D. N.Y.)), would seriously impede the fact-finding process. See *Palermo* v. *United States*, 360 U.S. 343, 349-353 ("grossly unfair" to impeach a witness using statements which were not his own but rather "the

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[3] These notes were not the kind of verbatim account of an interview which would be producible under the Jencks Act, 18 U.S.C. 3500, or Section 102.118 of the Board's Rules (Pet. App. 19A, n. 12.

product of the investigator's selection, interpretations and interpolations").

The decision below does not conflict with *National Labor Relations Board* v. *Capitol Fish Company*, 294 F. 2d 868 (C.A. 5), and *General Engineering, Inc.* v. *National Labor Relations Board*, 341 F. 2d 367 (C.A. 9). As the court below noted (Pet. App. 18A-19A), in both of those cases the Board sought to justify its refusal to produce the requested documents solely on the ground that permission had not been granted under Section 102.118(a) of the Board's Rules, 29 C.F.R. 102.118(a). Here, on the other hand, the refusal was grounded on a recognized evidentiary privilege.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1973.